

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, et al.,

Defendants.

NO. 2:18-cv-01115-RSL

THE STATES' MOTION TO COMPEL
PRODUCTION OF ADMINISTRATIVE
RECORD IN ACCORDANCE WITH
5 U.S.C. § 706

NOTING DATE: AUGUST 24, 2018

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 The State of Washington, on behalf of the Plaintiff States, moves to compel production
3 of the administrative record pursuant to section 706 of the Administrative Procedure Act (APA),
4 5 U.S.C. § 706, in time for the Court’s consideration on the States’ motion for preliminary
5 injunction. The APA requires the agency to produce the “full administrative record” of all
6 material “that was before [it] at the time [it] made [its] decision.” *Citizens to Pres. Overton Park,*
7 *Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*,
8 430 U.S. 99 (1977).

9 The hearing for the States’ motion for a preliminary injunction is on August 21, 2018, at
10 which the Court will assess the States’ likelihood of success on the merits of their claims.
11 Counts I and II of the First Amended Complaint raise legal questions, but Count III challenges
12 Defendants’ actions as “arbitrary, capricious, an abuse of discretion, or otherwise not in
13 accordance with law,” 5 U.S.C. § 706(2)(A) – a standard for which generally “the focal point”
14 is “the administrative record.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973).¹

15 To facilitate the Court’s review of Count III on the motion for preliminary injunction,
16 the States requested that Defendants expedite production of the administrative record, but they
17 refused. Counsel for Defendants stated that, under Local Court Rule (LCR) 79(h), they not are
18 required to produce the record before filing their responsive pleading. Declaration of
19 Jeffrey Rupert in Supp. of Motion to Compel Production of Administrative Record
20 (Rupert Decl.), Ex. F. LCR 79(h) specifically contemplates modification of this deadline for
21 “good cause.” Because the administrative record here is short and probative of the States’
22 likelihood of success on the merits of Count III, Plaintiffs respectfully seek an order compelling
23

24 ¹ Because this motion seeks relief against the Government Defendants only, all references to “Defendants”
pertain to the Government Defendants.

1 Defendants to produce the administrative record by August 15, 2018.

2 Plaintiffs have noted this motion as a third-Friday motion under LCR 7(d)(3). Due to the
3 time constraints of preliminary injunction proceedings, however, Plaintiffs intend to move by
4 telephone for expedited briefing and consideration of the instant motion. *See* LCR 7(i).

5 **II. BACKGROUND**

6 **A. The Challenged Agency Decisions**

7 The States challenge two agency actions in this case. The first is the “temporary
8 modification” of the United States Munitions List (Munitions List) issued by the Deputy
9 Assistant Secretary for Defense Trade Controls on July 27, 2018 to exclude certain listed
10 computer files from the Munitions List. *See* First Amended Complaint (Dkt. #29), Ex. 7; *see also*
11 *id.*, at ¶¶ 61, 134, 139-40, 145, 152-153, Prayer for Relief. The second is a letter dated July 27,
12 2018 from the Acting Deputy Assistant Secretary for the Directorate of Defense Trade Controls
13 to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation approving
14 computer files for public release and removing them from Munitions List Category 1. Dkt. #29,
15 at ¶¶ 134, 138, 141, 145-47, 152-53, Prayer for Relief; *see* Ex. A to Non-Governmental
16 Defendants’ Opposition to Emergency Motion for Temporary Restraining Order (Dkt. #11).

17 **B. The Administrative Record**

18 The administrative record underlying these administrative actions is likely to be limited
19 and cover a relatively short period of time. The first clue that the State Department was
20 considering reversing its longstanding position regarding dissemination on the internet of the
21 computer files at issue was an April 30, 2018 unopposed motion to stay in *Defense Distributed,*
22 *et al. v. U.S. Department of State, et al.*, No. 15-cv-372 (W.D. Tex.) (Dkt. #93). Twenty-four
23 days earlier, the State Department had taken the position that the same computer files “could be
24 used to threaten U.S. national security, U.S. foreign policy interests, or international peace and

1 stability.” Dkt. #29, at ¶ 51 (quoting *Defense Distributed v. U.S. Dept. of State*, No. 15-cv-372
2 (W.D. Tex.), Motion to Dismiss, Dkt. #92). Within three months, on July 27, 2018, the State
3 Department issued the final agency action reversing its litigation position, which is now
4 challenged in this case. In short, the Administrative Record was compiled in no more than
5 90 days.

6 Furthermore, the public, on-the-record statements of the State Department’s
7 spokesperson reported the basis for the State Department’s decision, and it was simple. In a press
8 briefing on July 31, 2018, State Department Spokesperson Heather Nauert repeated the agency’s
9 longstanding position that “the State Department wants to prevent the wrong people from
10 acquiring weapons overseas. That is the State Department’s equity in this.” Rupert Decl., Ex. A
11 (Heather Nauert, Department Press Briefing, U.S. Dep’t of State, at 4 (July 31, 2018), *available*
12 *at* <https://www.state.gov/r/pa/prs/dpb/2018/07/284841.htm>). Ms. Nauert continued, however,
13 that the agency made its decisions on 3D-printed firearm data because it “took the Department
14 of Justice’s (“DOJ”) advice.” Specifically, DOJ “suggested that the State Department . . . settle
15 this case, and so that is what was done.” *Id.*

16 The State Department’s revelation that it reversed its longstanding position on 3D-printed
17 gun files primarily at DOJ’s suggestion indicates that the reversal was not the product of complex
18 technical study by national security, firearms, or technology experts at the State Department or
19 other agencies. Rather, all signs suggest that the agency made its decisions largely at DOJ’s
20 behest over the course of a few months. The administrative record of that decision-making
21 process is likely to be short and easy to compile.

22 The administrative record consists of the documents and materials considered by the
23 Acting Deputy Assistant Secretary for Defense Trade Controls when he issued the July 27, 2018
24 Temporary Modification Notice and the July 27, 2018 letter to Wilson, Defense Distributed, and

1 the Second Amendment Foundation. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555
2 (9th Cir. 1989). This includes the written record of the direction the State Department received
3 from DOJ and the information he considered in determining that it was “in the interests of the
4 security and foreign policy of the United States” to temporarily modify the Munitions List. It
5 also includes any facts or information the Acting Deputy Assistant Secretary considered in
6 approving the files for public release and “unlimited distribution.”

7 **C. The States’ Request for the Administrative Record**

8 On August 1, 2018, counsel for Washington e-mailed Defendants’ counsel requesting
9 expedited production of the administrative record in light of the Rule 65 proceedings.
10 Rupert Decl., at ¶¶ 4-5 and Exs. B and C. Between August 5 and August 7, 2018, the States
11 repeated this request, ultimately asking Defendants to produce the administrative record by
12 August 15, 2018. *Id.*, at ¶¶ 6-10 and Exs. D-G. On August 6, 2018, Defendants responded that
13 they intended to file the administrative record, “to the extent one is required,” on the standard
14 timetable permitted in LCR 79, or October 1, 2018. *Id.*, Ex. F.

15 **III. CERTIFICATION OF GOOD FAITH ATTEMPT TO RESOLVE DISPUTE**

16 Counsel for the State of Washington certifies that he contacted Federal Defendants by
17 telephone in an attempt to resolve this motion without Court intervention. Rupert Decl.,
18 at ¶¶ 4-11.

19 **IV. ARGUMENT**

20 **A. Defendants Should be Compelled To Produce the Administrative Record Prior To
the August 21, 2018 Hearing**

21 To facilitate meaningful judicial review of agency actions, the APA requires the agency
22 to produce “the full administrative record that was before [it] at the time [it] made [its]
23
24

1 decision.” *Overton Park*, 401 U.S. at 402; *see also Occidental Petroleum Corp. v. S.E.C.*, 873
2 F.2d 325, 338 (D.C. Cir. 1989). Judicial review of an agency decision typically focuses on the
3 administrative record in existence at the time of the decision. *Camp*, 411 U.S. at 142.

4 The Court is scheduled to hear the States’ motion for preliminary injunction on
5 August 21, 2018. At that time, it will consider whether the States are likely to succeed on the
6 merits of Count III in the First Amended Complaint, which alleges that Defendants’ decisions
7 constituted “arbitrary and capricious agency action.” Dkt. #29, at ¶¶ 235-40. In making this
8 determination, the Court typically would review the administrative record and determine if the
9 agency “examine[d] the relevant data and articulate a satisfactory explanation for its action.”
10 *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
11 It would assist the Court in making this decision if it had the administrative record before it.²

12 Although Rule 79(h) permits the Government to file the administrative record
13 concurrently with its answer, the rule also contemplates modification of that deadline for “good
14 cause.” Good cause exists here because of the importance of the administrative record to the
15 preliminary injunction proceedings, as well as the relative ease with which the administrative
16 record can be compiled. As shown above, the State Department appears to have arrived at the
17 challenged decisions in fewer than 90 days. *See supra* at 2-3. The near-contemporaneous public
18 statements of the Department’s spokesperson suggest that the decisions were driven by DOJ
19 rather than a complex regulatory review process at the agency itself. *Id.*³

20
21 ² The administrative record is not necessary for the Court to address likelihood of success on
22 Counts I and II, which address whether Defendants’ actions were *ultra vires* in excess of their statutory authority
23 and contrary to law. Dkt. #29, at ¶¶ 218-34. As to Count III, the States believe the Court will find the challenged
24 actions arbitrary and capricious even without the administrative record, but they recognize that the record will
facilitate the Court’s decision. A court can adjudicate a motion for a preliminary injunction for an arbitrary and
capricious claim under 5 U.S.C. § 706(2)(A) even without the administrative record. *See, e.g., Save Our
Cumberland Mountains v. Norton*, 297 F. Supp. 2d 1042, 1046-47 (E.D. Tenn. 2003).

³ Even if Defendants were to file a motion to dismiss, this would not warrant staying their obligation to
file the administrative record. *See Fedmet Res. Corp. v. United States*, No. 14-00297, 2014 WL 6879126, *3 (Ct.

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V. CONCLUSION

For the reasons stated above, the States respectfully request that the Court order Defendants to produce the administrative record by no later than August 21, 2018.

DATED this 7th day of August, 2018.

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Int'l Trade 2014) (denying motion for stay of government's duty to file administrative record in light of motion to dismiss because "at this stage, the court considers it prudent to avoid delay resulting from the absence of an administrative record on which this case could proceed"). A stay pending resolution of a motion to dismiss is subject to the district court's discretion and, where a stay may damage another party, the moving party "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). The slight hardship Defendants would experience in compiling the administrative record does not outweigh the demonstrated irreparable injury to the States from delaying a court decision on their claims.

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***Pro Hac Vice motions forthcoming for all
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DATED this 7th day of August, 2018, at Seattle, Washington.

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